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# IV

# Panel I
# Commentary—Jus ad Bellum

**Robert Turner**[1]

Starting with the issue of the Taliban, Mike Schmitt continues to be troubled about the legality of using force against the Taliban. I began at this position also. Indeed, at one point I authored an opinion for an editorial page stating that if the Taliban resisted when the United States used force against al Qaeda, it would be legally permissible to use force against the Taliban. Subsequently, I have re-thought this view and I now think the appropriate way to deal with this issue is to recognize that the Taliban was not in fact either de jure or de facto the lawful government of Afghanistan.

To begin with, at the height of the "Taliban Regime," only three countries in the world, Saudi Arabia, United Arab Emirates, and Pakistan, conducted diplomatic relations with the Taliban. This means that 189 countries did not. When the UN Security Council ordered countries to either break relations with the Taliban or not to have dealings with the Taliban, the number of states with diplomatic relations with the Taliban became one, Pakistan. As an aside, I believe that Pakistan was probably encouraged by a number of states to

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retain such a relationship with the Taliban in order to have a state capable of communicating demands to the Taliban. However, almost all states that comprise the world community did not recognize the Taliban as the government of a sovereign state. Moreover, at the time the United States initiated the use of military force against the Taliban, the UN Security Council, on behalf of the international community, had taken the position that the Taliban did not comprise the government of a state. In fact, the Security Council consistently has referred to them as the "faction in Afghanistan known as the Taliban" so as to ensure there is a clear international understanding that the Taliban do not comprise the recognized government of the country of Afghanistan.[2]

The easiest way then, to resolve the issue of whether the Taliban was the recognized government of Afghanistan or not is to conclude that the Taliban was a religious force that had seized control over substantial parts of Afghanistan and was trying to enforce its moral rules upon the people. I do not believe that the Taliban viewed itself as the government of Afghanistan. My strong guess is that military leaders of the Taliban militia did not hold commissions issued in the name of the government of Afghanistan nor did they think of themselves as the armed forces of Afghanistan but rather as the enforcement arm of a religious organization or entity. Before Operation ENDURING FREEDOM began, I do not think the United States government, its citizens, or the citizens of Afghanistan perceived that the United States was going to war with Afghanistan. I think the perception and the reality were that the United States was using force inside Afghanistan to bring to an end a very abusive, illegitimate, totalitarian regime, controlling the people of that country. The United States was liberating the people of Afghanistan not oppressing them.

On a related note, an argument exists based on humanitarian intervention grounds for the US intervention in Afghanistan. After all, if one takes the position that international law makes it unlawful for sovereign states to intervene to prevent the genocide in World War II or the slaughter of two-million Cambodians, then international law itself has become part of the problem, not the solution. Indeed my friend Rudy Rummel in his book *Death by Government* points out that during the 20th century, probably three to four times more people were slaughtered by their own governments than died in hostilities throughout the entire century.[3]

Now let me raise a trivial point and one I have previously discussed with Professor Schmitt. Mike refers to the September 11th attacks as "causing

2. *See, e.g.*, S. C. Res. 1193 U.N. SCOR, 53d Sess., U.N. Doc. S/1193/(1998), para. 7.
3. RUDY RUMMELL, DEATH BY GOVERNMENT (1994).

property and financial damage measuring in the hundreds of millions of dollars." The reality is that this cost must be in the many billions of dollars. Counting only the value of the human lives lost in the attack on the World Trade Center, the cost would surely be in the billions of dollars. This is to say nothing of the incredible clean-up efforts currently underway or the impact of the attacks on financial institutions throughout the world. Added to this, of course, are the countless costs such as the lost time of business executives to airport security, the cost of strengthening cockpit doors, the loss to the airline industry.

These costs are only financial in nature though. How much more difficult to attempt to quantify the emotional costs in fear, anger and grief? I recently lectured on terrorism at the Naval Justice School, and my son came with me. During my presentation, my nine-year-old son drew a picture of the World Trade Center with some very poignant words about terrorism. This type of emotional cost cannot be measured in dollars but it is nonetheless tremendous. When all of these costs are quantified, we may well be talking in the trillions of dollars.

More substantively, I have a nuanced difference with Mike Schmitt regarding the definition of what an "armed attack" truly is. I think Professor Schmitt is taking a literalist approach to the UN Charter regarding the definition of an armed attack. It is true that Article 51 refers to the inherent right of self defense if an armed attack occurs against a member of the United Nations.[4] However, Professor Schmitt also makes the point that only members of the United Nations are cloaked with the inherent right of self-defense pursuant to Article 51. While perhaps true with respect to Article 51 in the literal sense, this is false in reality inasmuch as the inherent right to self-defense is a cornerstone of customary international law. As an example, when non-UN member North Korea invaded non-UN member South Korea, the United Nations Security Council acted and authorized the use of force in collective self-defense. Clearly, South Korea had this right before the action of the Security Council. Undoubtedly, the prohibition on the use of aggressive force contained in Article 2(4) of the UN Charter is binding but the more important point is

4. U.N. CHARTER, art. 51, provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security."

that Article 51 of the Charter does not *create* the right of self-defense.[5] While Article 51 was one of the most important parts of the charter, it was also an afterthought.

The prohibition against the aggressive use of force is embodied in Article 2(4) of the UN Charter. With the conclusion of the Act of Chapultepec in 1945[6] which embodied the principle of collective self-defense, the United States and its Latin American neighbors wanted the UN Charter to clearly state that if the Security Council was blocked from taking action by a veto or some other reason, the traditional right of collective self-defense as embodied in the Act of Chapultepec remained unimpaired and available. This was the ultimate purpose of Article 51 of the United Nations Charter.

Although the drafters of the UN Charter had in mind World War I and World War II, the French version of Article 51 uses the term armed aggression and not armed attack and I believe this to be the more appropriate focus of Article 51. The question is whether there is a wrongful act involving the use of lethal force that creates a right to use force in self-defense. Mind you, the proportionality doctrine applies in this analysis and a small incursion will not authorize a nuclear response or any disproportional response.

This view is quite clearly supported by a review of the notes exchanged at the time of the Kellogg Briand Pact of 1928. Prior to entry into force of this Pact, a number of countries were prepared to include reservations to their ratification reserving the right to self-defense. The US response was to send out a diplomatic note saying the right to self-defense is imprescriptable. This right pre-exists treaties, is inherent in treaties, and cannot be taken away, even by treaty. Interestingly, the Russian text of Article 51 also does not refer to the inherent right of individual or collective self-defense but instead to the

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5. In 1928, Secretary of State Frank Kellogg stated "that right is inherent in every state and is implicit in each treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from invasion and it alone is competent to decide whether circumstance require recourse to war in self-defense." Frank B. Kellogg, Address Before the American Society of International Law (Apr. 28, 1928) *in* 22 PROC AM. SOC'Y INT'L L. 141, 143 (1928). This quote constituted official US recognition at the time that the right of self-defense cannot be restricted by treaty.

6. Inter-American Reciprocal Treaty of Assistance and Solidarity (Act of Chapultepec, Mexico); March 6, 1945 This act provided:

> [t]hat every attack of a State against the integrity or the inviolability of the territory, or against the sovereignty or political independence of an American State, shall, conformably to Part III hereof, be considered as an act of aggression against the other States which sign this Act. In any case invasion by armed forces of one State into the territory of another trespassing boundaries established by treaty and demarcated in accordance therewith shall constitute an act of aggression.

*imprescriptable* right of individual or collective self-defense. Thus, given the US position and indeed that of the nations that became signatories to the Kellogg Briand Pact, the individual and collective right to self-defense is indeed imprescriptable.

So, to state that after entry into effect of the UN Charter, self-defense is only permissible in response to an armed attack, misses the point that lethal force continues to be available to states, members and non-members, in self-defense and in collective self-defense supporting the victims of aggression of the illegal use of lethal force by other states. Accordingly, I do not believe the standard to invoke either self-defense or collective self-defense to be quite as difficult to achieve as perhaps Professor Schmitt indicates.

Additionally, I believe that the International Court of Justice in the *Military and Paramilitary Activities Case In and Against Nicaragua*[7] quite simply, reached the wrong conclusion. This case had more political involvement than most cases and in my view does not reflect the law. Although Article 59 of the Statute of the ICJ provides that ICJ decisions have "no binding force except between the parties and in respect to that particular case,"[8] such decisions are often very useful for international lawyers trying to understand the developing law. However, with the exception of the brilliant dissent authored by Judge Schwabel, the ICJ decision in the *Nicaragua* Case is mostly cited in disagreement. In my opinion, this particular case has absolutely no precedential value.

The *Caroline* Case I think is better viewed as a description of anticipatory self defense than of self defense.[9] Others may disagree but if you really look at the facts, the steamboat was being fitted out with the intention of providing support to rebels in Canada. The British crossed the Canadian-US border, set the *Caroline* afire, cut it adrift, and apparently not realizing there were people onboard sent it over the falls. I think the *Caroline* Case may be too strong a test for self-defense. Regardless of which term is used, there ought to be an overwhelming presumption against the legality of initiating force prior to an attack by another country. But, particularly in an environment of weapons of mass destruction, the idea that the law ought to say a Saddam Hussein gets one more free kick before a state can defend itself strikes me as not very well thought out.

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7. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Merits, 1986 I.C.J. 14 [hereinafter Nicaragua Case].
8. Article 59, states: The decision of the Court has no binding force except between the parties and in respect of that particular case. I.C.J. Statute, Article 59.
9. *See* R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

On a related note, Professor Schmitt seemed to struggle a bit with justification for the attacks on the al Qaeda terrorist group. This is so because Article 2(4) of the UN Charter only talks about states. This seems to be a somewhat easier problem to resolve though. The Charter is designed to primarily defend the rights of states although it also set the stage for a tremendous growth of international humanitarian law involving individuals. I think the best view is that terrorists such as al Qaeda members are just like pirates in the sense that they are the common enemy of mankind. I think this should be the official US position, that terrorists occupy the same legal status as pirate. Note that this does not mean that terrorists are not protected by international law. Just as you cannot murder pirates, you cannot murder, maim, or torture terrorists. Both of these groups are entitled to some fundamental due process protections once they have either surrendered or are under your control. However, as long as they continue to engage in piracy or ongoing acts of terrorism, they are lawful targets.

With respect to Rein Müllerson's paper, his notion that the UN Charter continues to be updated by evolving customary international law makes great sense. I also share his view that al Qaeda is more the marionette than the Taliban. Professor Müllerson's comments on post-modern societies in Europe and the tension created between post-modern European societies and the still modern society of the United States were also quite intriguing. The tension between these two models presents serious problems.

Sun Tzu teaches us that the acme of skill is not to win one hundred victories and one hundred battles but to subdue the enemy without fighting.[10] The best way to do that with thugs such as Osama bin Laden and Saddam Hussein is to demonstrate to them that the perceived benefits of their behavior are greatly outweighed by the perceived cost. To do this, the world must unite against them.

We had to use force in 1991, but at that point we reestablished the credibility of the world community through the Security Council. Sadly, since then, we have largely frittered away that credibility in a variety of rather tragic incidents. At least prior to 9/11, we missed several opportunities to respond firmly to threats to the peace and particularly the problem of terrorism. And sadly, time is not on the side of the United States nor the other peace loving countries. In this era of weapons of mass destruction, this ostrich-like idea that the United States should not do anything until Saddam Hussein obtains weapons of mass destruction and delivery systems is fatally flawed. Should the United

10. SUN TZU, THE ART OF WAR (Samuel Griffith trans., 1963).

States really wait to act until after Saddam Hussein blows up his neighbors or destroys Israel? This approach is not helpful to the cause of peace.

I do not share Professor Mike Glennon's view that there is no coherent international law regarding the intervention of states. The basic prohibition against the aggressive use of force by states is well understood. As an example, even before the United Nations Charter, when Adolf Hitler invaded Poland, he claimed he was defending Germany from Poland. This was a lie but why did Hitler bother to lie? Hitler understood that, by itself, aggression was unlawful and that the world community viewed aggression as unlawful. Similarly, when Kim Il Sung invaded South Korea in 1950, he claimed that North Korea was simply defending itself against attacks by South Korea. This too was a lie. These two events highlight the reality that even the worst tyrants understand that it is illegal to engage in major acts of aggression. They mask it.

When the Sandinistas attempted to overthrow the government of El Salvador, they did a brilliant job of turning the world against the defensive response of the United States. But they did not come out and claim a right to overthrow the government of El Salvador. They did it in secret because they knew to do so was unlawful. If you read the American and Nicaraguan briefs before the world court, it would be hard to distinguish them. They basically gave the same summary of the law.[11] And each party charged the other with providing money, support and advice and said this is illegal. The question dealt with whether the US involvement was a defensive response, or was it an act of aggression directed against Nicaragua? I think the evidence now clearly shows it was a defensive response.

11. *See* Nicaragua Case, *supra* note 7.